

STATE OF ARIZONA  
IN THE OFFICE OF ADMINISTRATIVE HEARINGS

\_\_\_\_\_, Student, by and through Parent  
\_\_\_\_\_,  
Petitioner,  
v.  
Gilbert Unified School District,  
Respondent.

No. 08C-DP-08034-ADE

ADMINISTRATIVE LAW JUDGE  
DECISION

**HEARING:** Convened and concluded on May 5, 2008.

**APPEARANCES:** Parent \_\_\_\_\_ appeared and represented Student \_\_\_\_\_ and herself. Attorneys Matthew L. White and Denise Lowell-Britt, Udall, Shumway & Lyons, appeared on behalf of the Gilbert Unified School District, accompanied by Tommi Pierce, Special Education Director, Gilbert Unified School District. Court Reporter Kate Baumgarth of Arizona Reporting Service, Inc. recorded the proceedings.<sup>1</sup>

**WITNESSES:** For Petitioner: \_\_\_\_\_, Mother. For Respondent School District: Darian Morgan, Teacher of Visually Impaired; and Nancy R. Jenkins, Integrated Kindergarten Educator.

**ADMINISTRATIVE LAW JUDGE:** Kay. Abramsohn

Parent brings this due process action, on behalf of Student. Parent's action challenges the determination made by the IEP Team at Respondent Gilbert Unified School District ("Respondent" or "District"), that Student's current level of support from an instructional aide trained in visual impairment strategies was sufficient to allow progress on goals and benchmarks (and there was no need for a one-on-one aide) and there was no need for compensatory education (i.e., tutoring).<sup>2</sup> Parent had previously requested a full time one-on-one aide<sup>3</sup> and had previously inquired about summer

<sup>1</sup> Petitioner had, pre-hearing, requested a written record of the due process hearing proceedings; no copy was directed to be submitted to the Tribunal. This Tribunal has, by statute, made a digital recording of the proceedings which is the official record of the proceedings and which was also used for purposes of reviewing testimony during the Administrative Law Judge's consideration of the matter; the digital recording was available at no charge to the court reporter and the parties.

<sup>2</sup> Although these particular determinations were specifically set forth in a post-meeting notice subsequent to the filing of the due process complaint notice, the record reflects that these matters arose not only as single issues of parental concern but also in relation to Parent's overall concerns regarding Student and Student's levels of performance of multiple tasks and goals at various times during the several meetings held over the school year. See Exhibit K, IEP Post Meeting Notification dated April 7, 2008.

<sup>3</sup> See Exhibit U, Parent letter dated October 19, 2007.

1 programs and tutoring<sup>4</sup> among other concerns (most of which were primarily resolved at  
2 the multiple meetings held during the school year). When Respondent continued to not  
3 agree, or determine, that Student needed a one-on-one aide in addition to the services  
4 set forth in the IEP, Parent was not in agreement and filed the due process complaint  
5 notice requesting a full time one-on-one visual aide.<sup>5</sup>

6 The law governing these proceedings is the Individuals with Disabilities  
7 Education Act ("IDEA"), 20 United States Code (U.S.C.) §§ 1400-1482 (as re-  
8 authorized and amended in 2004),<sup>6</sup> and its implementing regulations, 34 Code of  
9 Federal Regulations (C.F.R.) Part 300,<sup>7</sup> as well as the Arizona Special Education  
10 statutes, Arizona Revised Statutes (A.R.S.) §§ 15-761 through 15-774, and  
11 implementing rules, Arizona Administrative Code (A.A.C.) R7-2-401 through R7-2-406.<sup>8</sup>

12 Petitioner filed the due process complaint notice on March 12, 2008.  
13 Respondent filed the Response on April 3, 2008. A resolution session was held on  
14 April 8, 2008. A pre-hearing conference was held on April 21, 2008, and the parties  
15 discussed the process and the issues presented in the complaint. At the time of the  
16 pre-hearing conference, only one issue was readily identified at that time, whether or  
17 not Student required a full time one-on-one aide as a part of his individualized  
18 education program ("IEP").<sup>9</sup>

19  
20  
21 <sup>4</sup> See Exhibit DD, IEP Addendum from February 1, 2008 (erroneously dated February 1, 2007), and  
22 Exhibit EE, IEP Post Meeting Notification dated February 1, 2008, and Exhibit JJ, IEP Addendum from  
23 April 3, 2008 (typewritten notes).

24 <sup>5</sup> This was Parent's proposed resolution in the due process complaint notice, along with a need for positive  
25 reinforcements and a "due process meeting" as soon as possible. In the notice, Parent also alleged  
26 several other things, without providing any particular dates and facts of the incidents which, therefore, did  
27 not appear to be focused on Parent's basic request for a full time aide. In the filing, Parent alleged: a  
28 classmate's harassment of Student; the need for Student to always have his glasses; the teacher's refusal  
29 to use a Braille writer (that was in the classroom); retaliation for prior complaints; loss of Student's clothing  
30 and personal property; not having (apparently, meaning allowing) Student to play outside in the grass and  
dirt; not allowing Student to use the bathroom when he needs to do so; generalized harassment due to  
Student's disability and race; the IEP team not doing every thing to help him educationally; and feeling as  
though all the IEP meetings were not accomplishing anything and were a waste of time.

<sup>6</sup> By Public Law 108-446, known as the "Individuals with Disabilities Education Improvement Act of 2004,"  
IDEA 2004 became effective on July 1, 2005.

<sup>7</sup> The current federal regulations became effective October 13, 2006.

<sup>8</sup> It is noted that these rules are being revised to comport with the 2005 changes in federal and Arizona  
special education law, but have not yet been published by the Arizona Secretary of State.

<sup>9</sup> See Administrative Law Judge Orders dated April 21, 2008 and April 29, 2008.

1 Parent's disagreement centers on her belief that Student requires a full time  
2 vision professional one-on-one aide in order to help him learn Braille and to help him  
3 with his class work, *i.e.*, to progress academically, and for multiple other purposes or  
4 reasons, as expressed in her pre-hearing disclosure (some of which are academically  
5 related, some of which are accommodation related and some of which are personally  
6 assistive related).<sup>10</sup>

7 District argues that Student has been provided sufficient and appropriate  
8 services, and the related support tools, under the IEPs developed to enable him to  
9 make progress on the IEP goals. In this regard, neither the integrated classroom  
10 teacher nor the visual impairment professional believe that a full time one-on-one aide  
11 is necessary and therefore, District argues Student's IEP offered a free and appropriate  
12 public education ("FAPE").

13 The parties presented testimony and Exhibits at the hearing conducted on May  
14 5, 2008. Petitioner presented testimony through Parent and Exhibits numbered 1  
15 through 7, which were received both through pre-hearing disclosure and as admitted  
16 into the record. District presented testimony from the witnesses noted above and  
17 Exhibits numbered A through MM<sup>11</sup> which were admitted into the record.

18 The Administrative Law Judge has considered the entire record, including the  
19 testimony and exhibits,<sup>12</sup> and now makes the following Findings of Fact, Decision, and  
20 Order finding that there is insufficient evidence from which to conclude that the  
21 assistance of a full time visual instructional aide is required. Petitioner has not met the  
22 burden to show that Respondent's implementation of the IEP failed to provide FAPE.

23 <sup>10</sup> Parent argued that a vision professional aide (rather than just an academic instructional aide) would  
24 better know how to use Braille and Braille equipment and help Student with the issues and tasks he faces  
25 each day at school. Parent expressed her belief, and frustration, that Student would have had a  
26 productive year, but instead Parent believed that it had been a "big waste of time." See Exhibit 1.  
27 Parent's primary frustration is that, to her observations, her son has not made any significant progress in  
28 learning the Braille system. It is clear that, in Parent's opinion, Student must learn Braille while he has  
29 sight and she is frustrated at what she sees as minimal, if any, progress during Student's Kindergarten  
30 year.

<sup>11</sup> These Exhibits are listed and briefly described in RESPONDENT'S LIST OF WITNESSES AND EXHIBITS.  
Petitioner stipulated to the admission of Respondent's proposed exhibits.

<sup>12</sup> The Administrative Law Judge has reviewed each admitted Exhibit, even if not mentioned in this  
Decision; it is noted that some exhibits required only glancing review, such as CV for persons who did not  
testify at hearing and the surgical operative reports (as there was no dispute regarding Student's medical  
history).

## FINDINGS OF FACT

1  
2 1. In May 2007, Student was diagnosed with congenital (infantile) glaucoma  
3 in both eyes.<sup>13</sup> See Exhibit I, Medical records including diagnostic information and  
4 operative reports and Exhibit O, operative reports. Since his diagnosis, Student has  
5 had four eye surgeries in efforts to reduce the pressure in his eyes and/or assist in his  
6 visual acuity. As one consequence of the need for such operations, Student has had  
7 absences from school.<sup>14</sup> See Exhibit LL.

8 2. Student is legally blind with no vision in his right eye and with 1% central  
9 vision in his left eye. Student has no peripheral vision. Student's eye specialists  
10 measured student's vision as 20/400 in his left eye.

11 3. Student attends [REDACTED] Elementary School Integrated Kindergarten class in  
12 Respondent's school district. Neither party specified the school schedule; based on the  
13 record, the Administrative Law Judge presumes that Student attends an all-day  
14 Kindergarten for five days.

15 4. In May 2007, Parent had completed a pre-school special needs screening  
16 forma. See Exhibit G. After a referral for special education evaluation and vision  
17 testing (and his first eye operation in June 2007), in July 2007, the IEP team met to  
18 discuss the results and determine eligibility and, if eligible, to develop an IEP. See  
19 Exhibits J and K.

20 5. At that time, the team determined that Student was eligible as a child with  
21 a visual impairment, and the team agreed that Student "would benefit from an  
22 integrated kindergarten, with additional adult support, occupational therapy, and  
23 services as appropriate from a teacher of the visually impaired."<sup>15</sup> Student's IEP was  
24 written for primary services in vision and fine motor to be provided (for 405 minutes

25 <sup>13</sup> This rare condition causes a chronic (markedly elevated) increase in eye pressure; the eyeball becomes  
26 enlarged, the cornea thins becoming milky and bulging, the pupil becomes large and fixed. If the condition  
27 progresses, the optic nerve becomes permanently damaged and blindness ensues. Surgical treatment,  
28 the earlier the better, is the only real hope of preserving any vision. THE MERCK MANUAL, Merck  
29 Research Laboratories, 16<sup>th</sup> Edition, (Robert Berkow, M.D., ed-in-chief 1962), page 2078.

30 <sup>14</sup> Additionally, Student has had absences from school due to his asthma; overall, as Student needed to  
be kept inside due to his asthma condition, these needs to stay inside were accommodated and noted.  
See Exhibits P and Z. Student's asthma diagnosis was made when he was an infant, for which he  
received steroids which worsened the effects of his then undiagnosed glaucoma. See MET Report,  
Exhibit K.

<sup>15</sup> See also the team's determinations summarized in the MET Report, page 8 within Exhibit K.

1 daily<sup>16</sup>) at the placement of the integrated kindergarten classroom. See Exhibit K,  
2 pages 4, 5 and 6. Additionally, Student would receive related services of occupational  
3 therapy and consultation, and transportation. In its Summary of the discussion, the  
4 team noted that the vision specialist was not available at that time, and would consult in  
5 the fall; further, under special considerations for education within the regular classroom,  
6 the IEP lists some accommodations but also notes that changes and accommodations  
7 necessary for education within the regular classroom will need to be added as  
8 recommended by the vision specialist. Importantly, the IEP sets forth four Vision goals,  
9 primarily related to use of the available magnification devices.

10 6. At the August 14, 2007 IEP meeting, the need for the medical reports was  
11 discussed, and the following day, Respondent received the Medical Certification of  
12 Visual Impairment from Mark Salevitz, M.D. See Exhibit M. The certification indicated  
13 that Student had congenital (end-stage) glaucoma in both eyes and was legally blind.

14 7. On August 14, 2007, the team, including vision specialist Darian Morgan,  
15 determined to provide vision services both of direct resource room services (for 120  
16 minutes monthly<sup>17</sup>) and consulting/incorporated in the kindergarten classroom (for 45  
17 minutes monthly), and also nursing services (presumably with regard to eye drops).

18 8. At that time, Student was scheduled for another eye surgery on August  
19 23, 2007,<sup>18</sup> and Respondent's visual specialist, Darian Morgan, believed it would be  
20 best to wait until after the surgery to determine whether to use Braille code. See Exhibit  
21 M. The August 14, 2007 IEP noted new vision goals, which generally consisted of  
22 various magnification tools. See Exhibit M. These were: (1) tracking a line of print  
23 using handheld magnifier at 90% mastery; (2) scanning materials using a video  
24 magnifier at 100% mastery; (3) locating page numbers and the print on pages  
25 independently using a video magnifier at 70% mastery; and (4) scanning cluttered  
26 materials to identify something specific at 80% mastery.

27 <sup>16</sup> 405 minutes equals 6.75 hours. The Administrative Law Judge presumes that 6.75 hours is Student's  
28 entire Kindergarten school day.

29 <sup>17</sup> The Administrative Law Judge is unable to simply attribute these stated services to a daily amount due  
30 to the inconsistent information regarding minutes per day and week given by the witnesses. See Finding  
of Fact # 26 herein.

<sup>18</sup> See Operative Report for dilation and viscocanalostomy in the left eye, Exhibit O; this was noted to be  
following two failed trabeculotomies.

1           9.     In September 2007, Student's glaucoma specialist, Jeffrey S. Kay, M.D.,  
2 prepared a Medical Certification<sup>19</sup> of the chronic health condition and made some  
3 recommendations for Student. See Exhibits Q and S. On September 13, 2007, Dr.  
4 Kay noted that, as of August 24, 2007, Student's vision was little to no light perception  
5 in the right eye and 20/400 in the left eye.<sup>20</sup> See Exhibit S and 6, and Exhibit I (July 31,  
6 2007 examination report).<sup>21</sup>

7           10.    In the September 7, 2007 recommendation, Dr. Kay indicated that the  
8 child "needs to learn Braille (sic) and will need large visual aids due to his visual  
9 impairment to assist with school work." See Exhibit Q and Exhibit 4.

10          11.    On September 10, 2007, Dr. Kay wrote out a prescription for Student to  
11 learn Braille because he was legally blind. See Exhibit R and Exhibit 2. While the scrip  
12 itself states: "Please instruct Braille for the child who is legally blind," Dr. Kay's prior  
13 written recommendation demonstrates that this prescription was not a directive to teach  
14 the child with Braille, but was a directive to teach Braille to the child.<sup>22</sup>

15          12.    On October 19, 2007, Parent requested an IEP meeting to discuss  
16 multiple items. See Exhibit U. Among other items, Parent requested that Student have  
17 a visual aide be with him at all times.

18          13.    Respondent noticed an IEP meeting to review and revise Student's IEP.  
19 See Exhibit V.

20          14.    At the October 30, 2007 IEP meeting, the team members determined to  
21 addend Student's IEP goals with new goals in regard to Vision and Braille, and also to  
22 addend with regard to behavioral goals. See Exhibit W. The new Annual Goals in

23 <sup>19</sup> Within this certification, Dr. Kay indicates that the child is scheduled for other surgery and will have  
24 some absences due to the surgery and the follow-up appointments. See Exhibit S; see also Exhibit T,  
25 Operative Report from September 27, 2007.

26 <sup>20</sup> A person with the visual acuity of 20/200 is considered to be legally blind. Student's vision at 20/400  
27 indicates his vision to be worse than vision at 20/200.

28 <sup>21</sup> Although Respondent's vision specialist tested Student's vision as being "better" than the physician had  
29 certified at 20/400 (see Exhibit AA, vision distances), any differences in the manner of the testing were  
30 neither compared nor explained at the hearing and legal blindness was not contested to diagnostically  
exist at 20/200; therefore, the Administrative Law Judge has little reason to discount the expert opinion of  
the treating physicians in this regard.

<sup>22</sup> According to the record, the Kindergarten curriculum is a print curriculum, and the preference in class is  
for Student to use his vision as much as possible. Vision Specialist Darian Morgan works with Student in  
the classroom as a low-vision student, and indicated that vision is Student's primary mechanism for  
accessing education (at this time).

1 Vision and Braille were: (1) form 10 Braille alphabet characters with objects in the egg  
2 carton or muffin tin with 80% mastery; (2) tactually recognize 6 Braille characters with  
3 80% mastery; (3) track a line of Braille characters from left to right and the next line with  
4 minimal assistance with 80% mastery; and (4) load paper into the Braille writer  
5 independently with 80% mastery.<sup>23</sup> Parent indicated her agreement at that time with  
6 the new goals. As a result of the new vision goals, the team members determined to  
7 provide Student with additional vision services, increasing the direct resource room  
8 services from 120 minutes to 160 minutes monthly and retaining the 45 minutes  
9 monthly for consultation/incorporated into classroom.<sup>24</sup>

10 15. The IEP comments do not indicate any discussion of any behavioral data  
11 (i.e., particular behaviors or patterns being seen and experienced in the classroom or at  
12 school) at that meeting. The team determined, on the recommendation of the  
13 Integrated Kindergarten teacher, [REDACTED] to add three behavior goals (which, in  
14 the summary notes, are stated as *needs*) for Student: to keep hands to himself; to  
15 respond verbally to teacher requests; and, to participate in class curriculum upon the  
16 teacher's request. See Exhibit W. The IEP does not set forth any particulars, such as  
17 behavior modifications, to be used to precipitate changes in Student's undesired  
18 behaviors or any measures for Student's success thereon.

19 16. The October 30, 2007 Post-meeting notice indicates that the IEP would  
20 be implemented as written; it makes no mention of a refusal of the requested aide, and  
21 specifically states "no options rejected." See Exhibit X.

22 17. Following a vision assessment by Darian Morgan, Parent and School  
23 Psychologist met on December 13, 2007 to discuss the assessment. Ms. Morgan's  
24 vision assessment of Student was incorporated into the Present Levels of Performance

25 <sup>23</sup> Exhibit W, the October 30, 2007 IEP Annual Goals page lists these Vision and Braille goals; this page  
26 was apparently created at the August 14, 2007 IEP meeting, based on the IEP number at the top of the  
27 page and the date at the top of the page. The Administrative Law Judge presumes, however, that these  
28 goals began to be implemented at some time *after* the August 14, 2007 meeting based on two facts: (1)  
29 Ms. Morgan's previous recommendation (at the 8-14-07 meeting) to wait to add Braille to the IEP until  
30 after the 8-27-07 surgery); and, (2) because the October 30, 2007 summary notes of the team's  
discussion indicates that Braille/equipment is infused/used in Student's classroom. However, an initial  
implementation date for the Braille goals is not in evidence.

<sup>24</sup> Again, the Administrative Law Judge is unable to simply attribute these stated services to a daily  
amount due to the inconsistent information regarding minutes per day and week given by the witnesses.

1 section of the IEP Addendum.<sup>25</sup> See Exhibit AA. Various low-vision aids were  
2 designated and other Braille literacy items were indicated to be in place and a list of  
3 accommodations was recommended; however it is noted that one recommendation set  
4 forth that Student needed training in use of the magnification devices.<sup>26</sup>

5 18. An IEP meeting was held on February 1, 2008 with regard to Parent's  
6 concerns about playground time (to be restricted due to Student's allergies) and  
7 Parent's request for summer school placement. See Exhibit DD. Parent was informed  
8 that Student had no current goals that were identified to be monitored for possible  
9 Extended Year Services ("ESY"). Parent requested that another meeting be scheduled  
10 so that her advocate could attend with her.

11 19. An IEP meeting was subsequently held on February 26, 2008 with regard  
12 to Parent's request for summer school placement; an advocate attended with Parent.  
13 See Exhibit GG. At this meeting, ESY services were discussed and a meeting was to  
14 be scheduled in April 2008 both for reviewing ESY data (to be collected over Spring  
15 Break) and for first grade transition planning. The Integrated Kindergarten teacher, [REDACTED],  
16 [REDACTED] reported that Student's academics were at the low end of average; she further  
17 indicated that Student's behaviors were less of a problem than at the start of the year,  
18 but that 2 to 3 times a week he "shuts down." At this meeting, Parent again asked  
19 about having a one-on-one aide for Student in the classroom.<sup>27</sup>

20 20. The March 4, 2008 Post-meeting notice indicates that the IEP would be  
21 implemented as written; it makes no mention of a refusal of the requested aide, and  
22 specifically states "no options rejected." See Exhibit HH.

23 21. An IEP meeting was held on April 3, 2008 with regard to ESY data and to  
24 develop a behavior intervention plan ("BIP") after a functional behavior assessment  
25 ("FBA"). See Exhibit JJ.<sup>28</sup> At that meeting, Parent again provided requests for items

26 <sup>25</sup> The Administrative Law Judge was unable to discern the actual date of the Vision Assessment from the  
27 hearing record.

28 <sup>26</sup> The Administrative Law Judge notes that these magnification devices had been provided to Student in  
29 August 14, 2007, and the Vision Specialist notes here, on December 13, 2007, that Student *needs training*  
30 in their use.

<sup>27</sup> The Administrative Law Judge presumes this request was being made due to Parent's current and  
ongoing perceived needs for Student.

<sup>28</sup> The meeting notice for this meeting did not mention first grade transition planning, as had been  
projected (at the last meeting) to be done at this meeting. See Exhibit II. However, the IEP Addendum



1 she believed that Student needs, some of which were items resolved by the team and  
2 some of which were not.<sup>29</sup> Parent's request for "IA" was noted to be an unresolved  
3 issue.<sup>30</sup>

4 22. With regard to ESY, the team determined that Student had not regressed  
5 over Spring Break and did not meet ESY criteria. With regard to FBA/BIP, the team  
6 determined to implement a BIP. Although the FBA is a part of the record, the prepared  
7 BIP was not nor did the IEP Addendum reflect any new behavior goals provided;  
8 therefore, the Administrative Law Judge was not able to review the entire BIP for  
9 implementation/application.<sup>31</sup>

10 23. The April 7, 2008 Post-meeting notice indicates that the BIP would be  
11 implemented, and that "suggestions"<sup>32</sup> on classroom needs from parent would be  
12 implemented. See Exhibit KK. The Post-meeting notice specifies Respondent's refusal  
13 to: (1) include additional minutes of dedicated paraprofessional service at this time;  
14 and, (2) provide individualized tutorial service outside of the service provided in the  
15 current IEP.

16 24. Student's Integrated Kindergarten class has thirteen students, including  
17 Student. Student is the only vision-impaired student.

18 25. The Integrated Kindergarten class has one classroom teacher, [REDACTED]  
19 [REDACTED] The classroom also has one full time teacher's assistant/aide, two part-time  
20 paraprofessionals (aides) who split the school day, one paraprofessional (sign-  
21 language) interpreter, and, as needed depending on the children in the classroom,  
22 other support or related service providers (such as physical and occupational  
23

24  
25 created was indicated to be effective for April 3, 2008; whether or not this was then projected to be his first  
26 grade IEP was not noted. Over the time period involved in this case, there are three IEP numbers, and  
such numbering was unexplained at the hearing.

27 <sup>29</sup> See Exhibit JJ for list in the typed meeting notes.

28 <sup>30</sup> In context, although this term was not spelled out in the meeting notes or on the post-meeting notice,  
the Administrative Law Judge determines that this was Parent's (third) request to the IEP team for a full  
time one-on-one aide, i.e., an individualized "instructional aide", for Student.

29 <sup>31</sup> Based on review of the documents in Exhibit JJ, it appears that only two pages (page 1 of 6, and page 3  
of 6) of the FBA/BIP were included in the Exhibit; the remaining pages were missing from the document.  
The meeting notes do contain discussion of the behaviors and possible interventions, and the notes do  
reflect that one alternate behavior goal is "verbalize needs appropriately."

30 <sup>32</sup> See Exhibit JJ, typed meeting notes.

1 therapists, and the vision specialist Darian Morgan).<sup>33</sup> One of the part-time  
2 paraprofessionals has undergone some training for Braille instruction.<sup>34</sup> Based on the  
3 composition of the teachers and paraprofessionals, an aide is available to Student at  
4 any time that he requests or needs one; one part-time aide is present from 8:00 a.m. to  
5 1:00 p.m. and the other part-time aide is present from 12:00 p.m. to 3:00 p.m.

6 26. Student is taken out of the Kindergarten classroom for resource room  
7 vision services instruction every day for 30 minutes by the instructional aide; since third  
8 quarter began, Ms. Sterling has been that aide. Student also receives vision services  
9 with Ms. Morgan when Ms. Morgan is in the classroom, which is two times a week for  
10 60 minutes total.<sup>35</sup> These services are sometimes in the classroom (primarily, working  
11 with the low-vision/magnification equipment) and sometimes in the resource room  
12 (primarily, Braille instruction).

13 27. With regard to academic instruction, the Kindergarten "curriculum" was  
14 not specifically addressed, either as to what is taught or is expected of all, or of typical  
15 Kindergarten students, or of Student in this regard.<sup>36</sup> A Kindergarten Levels of  
16 Performance Sheet was provided to the record, but was not explained during the  
17 hearing, and neither party presented any state standards with regard to any particular  
18 or specified level of performance for low-vision/blind students.<sup>37</sup> See Exhibit M.

19 28. There are three quarterly reports contained within the record. See Exhibit  
20 M. Because these reports each have varying items stated for "academics" and have a

21 <sup>33</sup> This information was taken from [REDACTED] testimony at hearing; this composition is one person more  
22 than the persons named in Respondent's Response to Petitioner's due process complaint, which did not  
23 mention the one full-time aide. The remaining paraprofessionals were not specifically named during the  
24 hearing.

25 <sup>34</sup> Ms. Morgan "trained" the instructional aide(s). The aide's training was explained as having been  
26 accomplished through training on those days when Ms. Morgan was present in the school for consultation  
27 (troubleshooting) and training. Ms. Morgan opined that it had been sufficient training for the aide to be  
28 able to instruct a child with low vision. In this regard, Parent stated that, according to the Foundation for  
29 Blind, it takes years to train a person to be able to teach the blind; no additional information on this topic  
30 was presented.

<sup>35</sup> Based on testimony, and with the presumption that Student is in school five days a week, the time  
calculated for Student to receive vision instruction would be 210 minutes a week; this calculation varies  
significantly from the amounts stated in the IEP, and the Administrative Law Judge is unable to discern  
any other clarification from the record.

<sup>36</sup> Both Ms. Jenkins and Ms. Morgan inferred that not much is expected academically from a child in  
Kindergarten; Ms. Morgan stated that a child in Kindergarten is not expected to be reading or writing.

<sup>37</sup> The Administrative Law Judge is unable to determine whether these would be applicable to all children,  
typical and special, or whether there are other specific standards for blind children.

1 rating scale for "self-management skills", the Administrative Law Judge presumes that  
2 the "academic" items listed on these quarterly reports reflect what was taught in  
3 Kindergarten during those quarters. At the time of the hearing, the 4<sup>th</sup> Quarter had not  
4 ended, and no blank form for the 4<sup>th</sup> Quarter was presented to the record.

5 29. The three quarterly reports in the record are marked with circles; the  
6 Administrative Law Judge presumes the circles on the Quarterly reports in Exhibit M are  
7 indicative of Student's mastery of those particular items. Additionally, included within  
8 the Exhibit were accompanying sheets with Student's printing thereon.

9 30. For the first quarter, academically, Student had only mastered the name  
10 of 1 of 6 letters taught, and had not mastered the sounds of any of the letters. Student  
11 counted only to 10 (out of 25). Student had identified 4 of 6 shapes taught. Student  
12 could identify 7 of 8 colors. With regard to printing of letters, numbers or name,  
13 Student's efforts can only be described as some lines, which basically stayed near the  
14 line on the paper. As to self-management skills, Student was below grade level in all  
15 instances: work habits; follows directions; listens attentively; and, self-control. Ms.  
16 Jenkins noted that Student had missed much of the quarter and commented  
17 "academics are not in place for him yet ... he usually needs one on one support during  
18 academic activities."

19 31. For the second quarter, academically, Student had mastered the name of  
20 16 of 20 letters taught, and had mastered the sounds of 9 of the 20 letters. Student  
21 counted to 20 (out of 50) with some skips. With regard to recognition of numbers,  
22 Student recognized 5 of 11 numbers. With regard to printing of letters of his name,  
23 Student's effort at his name is recognizable, which basically stayed near the line on the  
24 paper. As to self-management skills, Student was below grade level in work habits,  
25 following directions and self-control, but had improved in listening. [REDACTED]  
26 commented that "academic skills are progressing ... behavior continues to interfere with  
27 learning."

28 32. For the third quarter, academically, Student had mastered the name of all  
29 26 letters, and could somewhat connect the sound to the letter name. Student counted  
30 only to 29 (out of 75). With regard to recognition of numbers, Student recognized 6 of  
15 numbers. With regard to printing of letters, numbers or name, Student's efforts are

1 recognizable, and basically stayed between lines on the paper. As to self-management  
2 skills, [REDACTED] indicated that Student now had better work habits and listens  
3 attentively, but continued to have problems with following directions and self control.  
4 [REDACTED] noted that when student was "present and cooperative he makes good  
5 academic progress."

6 33. When questioned about Student's progress, [REDACTED] believed that  
7 Student had made some additional progress (projecting for the 4<sup>th</sup> quarter) but indicated  
8 that Student is performing at "low average" level. [REDACTED] attributed some  
9 misbehaviors not just to his young age but also to his efforts to be independent,  
10 mentioning the incident(s) when Student pushes away his slant board (either away or  
11 onto the floor).<sup>38</sup>

12 34. When questioned by Parent about Student's capability with Braille, Ms.  
13 Morgan could not recall exactly, but indicated that she believed that Student could  
14 recognize 6 letters, stating that he practices the letters in his name; there are eight  
15 letters in Student's name.<sup>39</sup> Ms. Morgan opined that, although difficult to assess  
16 (reason, due to his absences), Student had "progressed" toward his IEP goals. Ms.  
17 Morgan opined that the vision goals in the IEP were age-appropriate because  
18 Kindergarten students are working on pre-literacy skills, introduction to letters and  
19 number and students are not expected to be reading and writing; no other comparative  
20 or supporting material was provided.

21 35. Noticeably missing from the hearing record was any documentation of  
22 Student's level/status regarding the vision IEP goals.<sup>40</sup>

23 36. [REDACTED] believes that Student's behaviors and absences have  
24 interfered with his learning. Ms. Morgan also believes that his absences have interfered  
25 with learning. Student missed 18 of 42 days of school during the first quarter. Student

26 <sup>38</sup> No other explanation was proffered in this regard; however, clearly the child could equally be frustrated  
27 due to his limitations. Surprisingly, the record does not contain any school psychologist's information with  
28 regard to Student's behaviors and limitations. Neither party explored what the teacher's or aide's reaction  
29 or response is to Student in these instances.

30 <sup>39</sup> Ms. Morgan was not asked to check her notes; therefore, the record does not reflect Ms. Morgan's  
opinion of Student's current level of performance with regard to Braille. In this regard, Parent stated that  
when she uses Braille flash cards at home with Student, he does not recognize any Braille letters.

<sup>40</sup> Irrespective of a burden of proof, persuasion or going forward, such information was necessary to  
consider.

missed 7 of 47 days of school during the second quarter. Student missed 13 of 48 days of school during the third quarter. Overall, Student missed 38 of 137 days in the three quarters; this was 27.7% of the school year thus far. See Exhibit M, report card. There was no evidence presented that the instruction time Student missed due to medical absences was offered or provided to him at any other time or in any other manner.

37. Parent primarily questions Student's progress in Braille. Parent indicates that Student does not recognize the Braille letters (and she believes he only guesses at them) on either the flash cards she uses with him or on a large alphabet poster she has at home. Parent argues that Student cannot yet use the Braille writer, which she stated is difficult to use with multiple keys to press at the same time just to make one letter and, thus, multiple steps to make words. Parent's overriding concern is that Student must learn, *i.e.*, must be taught, the Braille system as soon as possible in order that Student can be a Braille transcriber and Braille reader as he goes through school.

38. This case raises the issue of whether Student's IEP provides FAPE, with specific regard to the sufficiency of the provided vision services and an aide.

#### **CONCLUSIONS OF LAW**

1. Through the IDEA, Congress has sought to ensure that all children with disabilities are offered a free appropriate public education that meets their individual needs.<sup>41</sup> These needs include academic, social, health, emotional, communicative, physical, and vocational needs.<sup>42</sup> To do this, school districts are required to identify and evaluate all children within their geographical boundaries who may be in need of special education and services. The IDEA sets forth requirements for the identification, assessment and placement of students who need special education, and seeks to ensure that they receive a free appropriate public education. A FAPE consists of "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction."<sup>43</sup>

<sup>41</sup> 20 U.S.C. §1400(d); 34 C.F.R. § 300.1.

<sup>42</sup> *Seattle Sch. Dist. No. 1 v. B.S.*, 82 F.3d 1493, 1500 (9<sup>th</sup> Cir. 1996) (quoting H.R. Rep. No. 410, 1983 U.S.C.C.A.N. 2088, 2106).

<sup>43</sup> *Hendrick Hudson Central Sch. Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 204 (1982).

1           2. Pursuant to IDEA, the District is required to annually review a student's  
2 IEP to determine whether the annual goals are being achieved and to revise the IEP as  
3 appropriate to address the lack of expected progress, the results of any reevaluations,  
4 information about the student provided by parents, the student's anticipated needs and  
5 any other unique matters.<sup>44</sup> These IEP determinations and the placement decisions are  
6 made by a group of people, the IEP Team which includes the parents, knowledgeable  
7 about the student, about the available evaluations and about the placement options.<sup>45</sup>

8           3. In this case, the hearing evidence demonstrated that Student's IEP Team  
9 has, *of necessity*, met numerous times, with regard to newly obtained information, of  
10 the vision information and assessment and of behavioral problems, and in response to  
11 Parent's concerns. Using this factor alone gives the Administrative Law Judge no  
12 indication that Student's IEP is or is not appropriate or that it provides FAPE. In the  
13 context of a due process complaint, such a fact typically only serves to indicate that the  
14 parties are in an ongoing productive relationship with regard to the child and addressing  
15 the child's needs. No school should view such a fact (numerous such meetings) as  
16 persuasive or convincing evidence of an IEP that provides FAPE or of a parent's  
17 acceptance or agreement with the IEPs created and/or the services set forth therein.  
18 The question might still remain whether the IEP did actually provide FAPE despite the  
19 best efforts of the parties and a parent might still disagree with the IEP. In this case,  
20 the Administrative Law Judge concludes that the record clearly reflects this team's  
21 dedicated efforts on behalf of Student in continuing to modify and addend the IEP in  
22 their efforts to meet Student's needs.

23           4. This is a difficult case to assess and review. When a child has not been  
24 receiving the three to five year old services under the IDEA, there is little information or  
25 data available regarding a five year old child in his first year of formal special education.

26  
27 <sup>44</sup> See 34 C.F.R. § 300.324(b). Here, the Administrative Law Judge is not able to identify precisely when  
28 Student's annual review is scheduled, due to the various Addendums (and their respective varied effective  
29 dates) and the nonclarity caused by the three different IEP numbers; for example, see Exhibit W,  
30 Addendum with three duration periods for three various services. However, the Administrative Law Judge  
also presumes that a review will take place (possibly in August 2008) with respect to Student's first grade  
IEP needs, although the hearing record seemed to indicate that this was to have taken place at the April 3,  
2008 IEP meeting.

<sup>45</sup> See 34 C.F.R. §§ 300.116(a) and 300.501(c).

1 That is the case here. The Administrative Law Judge had very little information and  
2 data against which to consider Student's IEP in relation to Student and his Kindergarten  
3 education. There were few standards presented against which to measure his  
4 progress, both as a Kindergartner and as a legally blind child. The Administrative Law  
5 Judge was presented with quarterly "academic" curriculum standards, which showed a  
6 minimal curriculum. However, the Administrative Law Judge was also presented with a  
7 Kindergarten Levels of Performance Sheet, which is much more comprehensive but  
8 which was not explained during the hearing. Based on the evidence of Student's vision  
9 capabilities, many of the levels of performance, especially the writing levels, stated in  
10 that document would not have been achievable by this Student, by this legally blind  
11 student. The Administrative Law Judge is unaware whether there are any state  
12 standards with regard to levels of performance for low-vision/blind students. In this  
13 case, the Administrative Law Judge is left to wonder how a blind child is expected to  
14 meet the Kindergarten Levels of Performance, and whether the IEP written for Student  
15 was geared toward Student's accessing the Kindergarten curriculum or was geared  
16 toward accomplishing only those specified vision, motor and behavior goals.

17 5. The Administrative Law Judge next looked to the specific special  
18 education goals, which are supposed to address a child's individual needs in order that  
19 the child is able to access the education being provided. Here, the IEP's vision goals  
20 dealing with magnification and visual-aid tools do support Student's access to the  
21 Kindergarten "print" curriculum. However, the evidence demonstrated that, in  
22 December 2007, Ms. Morgan indicated that Student still needed training in the use of  
23 such tools, even though he had been given those tools in August 2007.<sup>46</sup> Therefore,  
24 the record showed that *more* training and/or assistance than that which was provided to  
25 Student between August and December *was needed* at that time, regardless whether  
26 that would have been the responsibility of the vision instructor, the "trained" aide or the  
27 teacher. However, the record does not evidence whether Student has, or has not,

28 <sup>46</sup> The Administrative Law Judge could not determine, from the record, whether this was a factor of  
29 Student not having been completely trained (such as due to being absent) or of Student having been  
30 trained but not remembering how to use the tools and needing prompting or assistance with the tools. On  
the other hand, Student made some academic progress, which due to his vision must have been in part  
due to some use of the magnification tools.

1 received such additional, or refresher, training since that time. Based on the overall  
2 picture of this child within the Kindergarten curriculum, the IEP's vision goals (to  
3 recognize 6 Braille letters, be able to produce 6 Braille letters and be able to form 10  
4 Braille letters with the educational tool) may have been age-appropriate but in the larger  
5 sense: (1) did not correspond with the Kindergarten curriculum to learn and recognize 6  
6 letters in the first quarter, 20 letters and 11 numbers in the 2<sup>nd</sup> quarter, and all 26 letters  
7 and 6 of 15 numbers in the third quarter; and (2) could not begin to provide access to  
8 any Braille-type curriculum that might have been garnered for Student. Parent argued  
9 that Student needs to learn and to know Braille because Student is, and will be, blind  
10 for the rest of his life and because Student is headed to more rigorous academics in  
11 future grades. While the IDEA has, as its core, the access and opportunity to education  
12 for disabled students, the IDEA does not mandate that a Student succeed in school and  
13 it cannot guarantee that a child will reach a particular level or the highest attainable  
14 level.<sup>47</sup> In this case, Parent has the present, *and the future*, in mind as being required  
15 to be addressed under the IDEA. However, a school is required to educate each child  
16 in the present, and must give the child the opportunity and access to the education that  
17 is being presented. The reader should not presume, however, that a school need not  
18 look to the total child to see what should, must or can be done, in the way of special  
19 services, in order to enable the child to obtain educational benefit. All information that  
20 is known and available is required to be reviewed by the IEP team.<sup>48</sup> In this case,  
21 Student's present needs and his future needs converge, of necessity, in order for this  
22 Student to obtain educational benefit. On balancing the available evidence, the  
23 Administrative Law Judge can conclude only that Student with his specific needs and  
24 limitations (and unfortunately, his behavior issues) *may* have needed more than what  
25 Respondent has given him or proposes to continue to give to him; the evidence in this  
26 matter was insufficient to conclusively determine a failure to provide FAPE.

27 6. The issue for the Administrative Law Judge, as raised by Parent, is  
28 whether, according to the IDEA and the law, Student needed, and/or needs, more

29 <sup>47</sup> See *Rowley*, 458 U.S. at 201, wherein the Court determined that the lower courts had "erred" when  
30 holding that the IDEA required a school to maximize the potential of each disabled child.

<sup>48</sup> 34 C.F.R § 300.324(b).



1 services or more specially designed instruction than that which was set forth in his IEP.  
2 The United States Supreme Court in *Board of Education of Hendrick Hudson School*  
3 *District v. Rowley*<sup>49</sup> determined that the concept of access to FAPE requires a school  
4 district to provide "specially designed instruction" and sufficient "supportive services as  
5 may be required to assist a handicapped child to benefit [educationally] from special  
6 education." *Rowley*, 458 U.S. at 201. The Court acknowledged both that a  
7 determination of "sufficient educational benefit" was a difficult determination and that  
8 two different children would have different success in each academic setting.<sup>50</sup> *Rowley*,  
9 458 U.S. at 202.

10 7. Here, the record paints a picture of a five year old child with multiple  
11 issues. He has the medical condition of asthma causing social limitations on  
12 continuous interacting and play with his fellow students (due to playground limitations).  
13 He has the medical condition of glaucoma/blindness resulting in little to no vision. He  
14 has had medical absences due to both conditions that have, as admitted by the parties,  
15 interfered with his learning. He also has misbehaviors which, as admitted by the  
16 parties, interfere with his learning. This Student, according to his quarterly progress  
17 reports, is performing below grade level, and this is only Kindergarten. Student's  
18 hearing has been tested, and he passed; therefore, his teacher believes that he hears  
19 the instructions, and the progress reports indicate that (as the year progressed) he  
20 listens more attentively. During the hearing, no person mentioned any other possible  
21 explanations for Student's self-management issues. There was no indication that  
22 Student has been evaluated for any other medical conditions or any other disability  
23 (such as a learning disability) that might be contributing to his below grade status in  
24 self-management skills. The record reflects the team's discussion of behavioral data,  
25 but the latest BIP was not completely available for consideration by the Administrative  
26 Law Judge. There were some unintentional voids in the hearing record; additional  
27 evidence would have been useful in making this decision. Primarily, what was  
28 Student's status with regard to progress on the vision goals and on the other special

29 <sup>49</sup> 458 U.S. 176 (1982).  
30

1 education IEP goals? Was the April 3, 2008 IEP the first grade IEP or simply an  
2 addendum to the Kindergarten IEP? If the Kindergarten curriculum is "print", when is  
3 Braille curriculum available and will it be available or provided in first grade? What  
4 portion of the day was devoted to academics, *i.e.*, what did Student miss academically  
5 due to his absences? Was the BIP geared to intervention, behavior modifications, that  
6 will accommodate Student's need to "attend to" tasks and to the curriculum? Was there  
7 any school psychologist assessment or report that discusses what this child needs  
8 behaviorally, in the way of attending skills and coping skills to deal with and overcome  
9 his vision limitations, and whose responsibility is it to give him these skills (in the school  
10 setting, it appears it must be the school).<sup>51</sup> Finally, what was the child's most recent  
11 vision diagnosis and prognosis status – for it is not just Student's absences and his  
12 behaviors that interfered with his education, but Student's legal blindness also stands in  
13 the way of Student accessing a great deal of educational curriculum.

14 8. Student is eligible for special education services, and an IEP has been  
15 created and implemented for him. Neither party assured that the record documented  
16 Student's progress on IEP goals, but Parent has continued to press for more instruction  
17 and more services to assist Student. Early on, Parent requested visual magnification  
18 equipment to assist Student; the record demonstrates that these have been provided,  
19 and some equipment has also been provided for his use at home. Early on, Parent  
20 requested and suggested many accommodations so that Student can better access the  
21 classroom education; the record demonstrates most of these have been provided and  
22 implemented, such as the slant board, the preferential seating, bolded or highlighted  
23 materials, verbal cues for alternative physical education. See Exhibit AA. All this did  
24 not quell in Parent's mind her fears that Student was not making progress, that he was  
25 not learning Braille. Parent next requested tutoring and ESY. Her specific reasons for  
26 requesting such were not evident; however, it is presumed that the request was based  
27 on her hope for anything and everything that might be possible to assist her son. With

28 <sup>50</sup> Subsequently, see *Lenn v. Portland School Committee*, 998 F.2d. 1083, 20 IDELR 342 (1<sup>st</sup> Circ, 1993),  
29 which also determined that the benefit conferred by IEPs must afford some educational benefit but need  
30 not reach the highest attainable level or even the level needed to maximize the disabled child's potential.

<sup>51</sup> The record demonstrated that Nicole Boeri, School Psychologist, was present at most of the IEP  
meetings.

1 regard to ESY, the record demonstrated that data was gathered and reviewed and  
2 Student had not regressed, and therefore, did not meet ESY criteria. ESY was not at  
3 issue in this matter, and will not be further addressed.

4 9. Finally, and the major issue for determination herein, Parent has  
5 requested additional assistance for Student, describing such assistance both as an aide  
6 to be with him all the time and as a visual instruction aide to be with him all the time.  
7 Parent makes this request so that Student can learn Braille and can do his school work,  
8 and for assistance to him throughout the day with other school activities and tasks.  
9 Respondent continues to assert that a full time aide is not necessary, and that the  
10 services in the IEP are sufficient to enable Student to access Kindergarten and obtain  
11 educational benefit. Parent's request for tutoring dovetails somewhat with the request  
12 for an aide's additional assistance for Student. Parent may not know the exact  
13 technical terminology, but she persists in her beliefs that more should be, or is required  
14 to be, done to help her son. For the Administrative Law Judge, that translates to  
15 whether Student's current level of support as set forth in the IEP (from the vision  
16 instructor and the instructional aide who is trained in visual impairment strategies) is  
17 sufficient for progress on goals and benchmarks or whether it is not and additional  
18 services are needed up to and including a full time visual instructional aide and any  
19 compensatory education.

20 10. A parent who files for a due process hearing alleging non-compliance with  
21 the IDEA must bear the burden of proving that claim.<sup>52</sup> The standard of proof is  
22 "preponderance of the evidence," meaning evidence showing that a particular fact is  
23 "more probable than not."<sup>53</sup> Petitioner bears the burden of proving by a preponderance of  
24 evidence that the last IEP, with the services and specially designed instruction set forth  
25 therein did not offer FAPE to Student. In this case, the record available is *not* sufficient to  
26 persuade the Administrative Law Judge that such was the case with regard to Student's  
27 IEP and Addendums.

28 <sup>52</sup> *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528 (2005).

29 <sup>53</sup> *Concrete Pipe & Prods. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 622, 113 S. Ct. 2264, 2279  
30 (1993) quoting *In re Winship*, 397 U.S. 358, 371-372 (1970); see also *Culpepper v. State*, 187 Ariz. 431,  
437, 930 P.2d 508, 514 (Ct. App. 1996); *In the Matter of the Appeal in Maricopa County Juvenile Action No.*  
*J-84984*, 138 Ariz. 282, 283, 674 P.2d 836, 837 (1983).

1           11.    The totality of the evidence at the time of hearing demonstrated that  
2   Student had not progressed much from his initial level to a "Kindergarten" grade level.  
3   In all the evidence available to the Administrative Law Judge, there was no documented  
4   evidence of Student having progressed toward, or meeting, any of his special education  
5   goals in vision, motor or behavior; the quarterly progress reports show only some  
6   progress toward Kindergarten curriculum. The record demonstrated that, after four  
7   months with the magnification tools, Student still needed training. The Administrative  
8   Law Judge is left with the *sense* that, in the absence of some other disability that would  
9   prevent a five year old from attaining either the Kindergarten goals or the special  
10   education goals, Student *should* have achieved these minimal "age-appropriate" goals.  
11   The evidence was inconsistent with regard to the time/minutes of services that was to  
12   have been provided and that was apparently provided. Student had absences that  
13   interfered with his education and he had behaviors that interfered with his education. It  
14   would not be possible to say that such interference circumstances limited Student only  
15   with regard to the Kindergarten curriculum, such circumstances must have also limited  
16   him with regard to the special education goals. However, on balance, the  
17   Administrative Law Judge must conclude that the record was insufficient to  
18   demonstrate that the special education services set forth in the IEP were insufficient to  
19   meet Student's individualized special education needs and therefore not provide FAPE  
20   to Student.

21                                   ORDER

22           Based on the findings and conclusions above,

23           IT IS HEREBY ORDERED that the relief requested in Petitioner's due process  
24   complaint is denied.

25           Done this 27th day of May, 2008.

26                                   OFFICE OF ADMINISTRATIVE HEARINGS

27                                   

28                                   Kay A. Abramsohn  
29                                   Administrative Law Judge  
30

1  
2 **RIGHT TO SEEK JUDICIAL REVIEW**

3 Pursuant to 20 U.S.C. § 1415(i) and A.R.S. § 15-766(E)(3), this  
4 Decision and Order is the final decision at the administrative level.  
5 Furthermore, any party aggrieved by the findings and decisions made  
6 herein has the right to bring a civil action, with respect to the complaint  
7 presented, in any State court of competent jurisdiction or in a district court  
8 of the United States. Any action for judicial review must be filed within 90  
9 days of the date of the Decision or, if the State has an explicit time  
10 limitation for bringing this type of action, in such time as the State law  
11 allows.

12  
13 Copies e-mailed this 27 day of May, 2008

14  
15 Copies mailed this 27 day of May, 2008, to:

16 [REDACTED]  
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19 Parent

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By Chris Fishbein